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In the [redacted]

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OF PETITION FOR [redacted]
STATE COURT [redacted]

BRIEF FOR [redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 263

MORRIS DIAMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 6–9) is reported at 267 F. 2d 23.

JURISDICTION

The judgment of the court of appeals was entered May 19, 1959 (Pet. App. 5). The petition for a writ of certiorari was filed July 30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

On the motion of the United States Attorney, without notice to the defendant, the district court dismissed, before trial, an action for denaturalization without prejudice. On appeal, the court of appeals remanded the cause for a hearing as to whether or

not the cause should have been dismissed without prejudice and on what terms and conditions. The question presented is whether the court of appeals should itself have directed a dismissal with prejudice.

RULE INVOLVED

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides:

> (2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

STATEMENT

In September 1956, the United States instituted an action in the District Court for the Southern District of Florida seeking to cancel a certificate of naturalization issued to petitioner on the ground that petitioner had deliberately made false statements and concealed material facts in the proceedings leading to naturalization (R. 1–7). Petitioner's answer was filed August 14, 1957 (R. 15–17), and the case was set for trial on August 26, 1958 (R. 18). The United States Attorney, on the day before trial, without notice t

petitioner, moved to dismiss the case without prejudice, and the district court granted the motion (R. 19).

The United States, on August 27, 1958, filed a new complaint which was the same as the former complaint (R. 20–22). Petitioner then moved, on August 28, 1958, for modification of the prior order of dismissal to provide that the dismissal be with prejudice. He alleged that the proceedings up to the time of dismissal had been of substantial expense and of considerable worry to him (R. 23–24). The district court denied the motion (R. 25).

On appeal from that denial, the court of appeals held that under Rule 41(a)(2), F.R. Civ. P., the order of dismissal should not have been entered without notice to petitioner. It accordingly vacated the order of dismissal and remanded the cause "in order that a hearing may be had upon the motion and a determination made, in the discretion of the court, as to whether or not the cause should have been dismissed without prejudice and, if so, upon what terms and conditions, if any" (Pet. App. 5).

ARGUMENT

Petitioner asks this Court to review the order of the court of appeals remanding the cause for a hearing as to whether the dismissal should be with or without prejudice. He claims that the court of appeals should itself have directed a dismissal with prejudice. There is no occasion, however, for this Court to review the matter at this interlocutory stage. A proceeding to cancel a certificate of naturalization is a civil suit. *Klapprott* v. *United States*, 335

U.S. 601, 612; *Schneiderman* v. *United States*, 320 U.S. 118, 160. Because the dismissal was before trial, it would, under Rule 41(a)(2), F.R. Civ. P., *supra*, p. 2, normally be without prejudice. The court of appeals has ruled that it was error to permit the dismissal without giving petitioner an opportunity to be heard and has held that the district court may require a dismissal with prejudice, if the circumstances so warrant. It is not, however, the province of the court of appeals, or of this Court, to decide in the first instance and without any hearing whether the case should be dismissed "with prejudice," since Rule 41(a)(2) vests this discretion in the district court. *Grivas* v. *Parmelee Transp. Co.*, 207 F. 2d 334, 338 (C.A. 7), certiorari denied, 347 U.S. 913; *United States* v. *Lyman*, 125 F. 2d 67, 70 (C.A. 1); *Butler* v. *Denton*, 150 F. 2d 687, 690 (C.A. 10); *Hydraulic Press Mfg. Co.* v. *Williams, White & Co.*, 165 F. 2d 489, 495 (C.A. 7); *Home Owners' Loan Corp.* v. *Huffman*, 134 F. 2d 314, 317 (C.A. 8), certiorari denied, 316 U.S. 681.

CONCLUSION

For the reason stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1959.

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